United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1307

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSE RODRIGUEZ BAEZA,

Appellant.

B.

Docket No. 74-1307

P/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JOSE RODRIGUEZ BAEZA, Appellant.	Docket No. 74-1307

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the failure to sever based on the Government's proof that appellant was discharged from the alleged conspiracy in November 1969 constitutes reversible error.

2. Whether the District Court improperly permitted the introduction of testimony concerning appellant's expenditure of $3,000 without proper foundation.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Thomas P. Griesa) rendered March 4, 1974, after a trial before a jury, convicting appellant of one count of conspiracy to import and sell a dangerous drug. Appellant was sentenced to a seven-year term of imprisonment, which he is presently serving.

Leave to appeal in forma pauperis was granted, and this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal,* pursuant to the Criminal Justice Act.

Statement of Facts

The indictment** charges appellant and eight co-defendants*** with conspiracy to import and distribute heroin and cocaine during the period November 1968 through

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*At trial appellant was represented by Stuart Holtzman, Esq., assigned pursuant to the Criminal Justice Act.

**The indictment is annexed as "B" to appellant's separate appendix.

***Five defendants were tried in the present proceeding. In addition to appellant, they were the co-defendants Rodriguez, Terrell, Uziel, and Stanzione. The case of the co-

November 1973 (count one); and with the substantive offense of possession of heroin (inside the chassis of a Jaguar* sports car) on September 19, 1971 (count two).

The Government's case was presented through the testimony of a total of twenty-nine witnesses.** George Perez, a co-conspirator serving seven years as a result of his conviction on the original "Jaguar" case (see footnote* below) was the Government's chief witness.*** According to

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defendant Ortega, who was convicted in the first "Jaguar" case (see footnote* below), was severed because he was not named in the first two counts and was the sole defendant charged in count three, i.e., being an "organizer, supervisor and manager" of a continuing criminal enterprise, in violation of 21 U.S.C. §848. The remaining co-defendants -- Orsini, Vidal, and John Doe, a/k/a "El Gallego" -- were either fugitives or otherwise unavailable for trial.

*The original prosecution of what has been referred to as the "Jaguar" case resulted in the conviction of the defendants Ortega, Perez, and Orsini. These convictions were affirmed by this Court (Medina, J., writing) in United States v. Ortega, 471 F.2d 1350 (2d Cir. 1972). The defendants Orsini, Perez, and Ortega were found in possession and control of the Jaguar on September 19, 1971. The Jaguar had been loaded with approximately 93 1/2 kilograms of heroin when it left England aboard the Queen Elizabeth II; however, during the voyage, federal Customs and narcotics agents removed all but half a kilogram, and thus the vehicle contained only the latter amount at the time of the defendants' arrest. In the present case, the defendants' responsibility for the commission of the substantive offense was predicated entirely on the Pinkerton theory.

**The trial lasted approximately five weeks, commencing on November 13 and culminating on December 19, 1973. The final week consisted of jury deliberations.

***In consideration of Perez' testimony, Perez and his wife were promised immunity from prosecution. Moreover, the Government promised to raise no objection to Perez' untimely motion for a reduction of sentence pursuant to Rule

Perez' testimony, however, appellant Baeza was thrown out of the conspiracy at the end of October 1969.* Thus, out of the twenty-nine government witnesses called, only two -- Perez and Gladys Togoada, a former girlfriend of appellant Baeza's -- testified as to appellant's involvement in the alleged scheme. The direct and cross-examination of these witnesses constituted approximately seventy-five pages of the trial transcript, whereas the Government's entire case consumed over 1,900 pages of the trial record. The other government witnesses testified to aspects of the conspiracy occurring after appellant was expelled, particularly as to the events leading up to and including the Jaguar transaction charged in count two, on which the Government introduced into evidence approximately two hundred pounds of 98%-pure heroin.**

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35 of the Federal Rules of Criminal Procedure then pending before Judge Pierce.

Additionally, the Government promised a recommendation of leniency before Judge Pierce, and before the Board of Parole if the Rule 35 motion was unsuccessful (Transcript of November 21, 1973, at 17-25). Counsel is informed that subsequent to the trial, Perez' sentence was reduced and that he is presently released on parole.

*Appellant's guilt of the substantive crime charged in count two could be found only under Pinkerton. However, since appellant was not a member of the conspiracy at the time the substantive act took place, the count was dismissed as to him.

**Defense counsel made timely and continued requests for severance on the ground that the cumulative effect of evidence unrelated to appellant, especially the introduction of almost 200 pounds of 98%-pure heroin on the substantive

A. The Government's Case

Perez testified that in 1959 he and his wife opened a travel agency known as Via World Wide Tourist located at 992 Amsterdam Avenue in New York City (Transcript of November 16, 1973, at 3*) Perez stated that he was first introduced to appellant in the summer of 1968 when an acquaintance named Luis Ortega** and appellant came to his agency to purchase airline tickets.*** According to Perez, Ortega and appellant returned to the agency in September 1968 to purchase airline tickets for a trip to Spain.**** The were accompanied by a person named Jose Jiminez Centor, whom Ortega identified as "our contact in Spain" (22-23). Two days later Ortega and Baeza returned with a suitcase containing $100,000 in bills of low denomination which Perez changed to $100's for a one per cent commission (26).

Perez testified that approximately four weeks later the same three returned, at which time Ortega stated that

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offense, would deprive appellant of a fair trial on the conspiracy charge. The court refused to sever.

*All further references to Perez' testimony, unless otherwise indicated, are to the transcript of November 16, 1973.

**Ortega was convicted of conspiracy and possession with intent to distribute at the earlier trial.

***Ortega allegedly stated at that time that Baeza would be working with him in the heroin operation (22).

****Government Exhibit #13 consisted of Perez' copy of the airline tickets issued on that occasion.

that they had made a contact in Mexico -- named Suarez -- and that they were ready to bring heroin into New York via San Antonio, Texas (26). Two days later appellant and Ortega -- the latter traveling under the name "Juan Plaza" -- purchased airline tickets through Perez to fly to San Antonio (26).

During the spring and early summer of 1969, Perez stated, he issued airline tickets to Ortega and appellant in connection with a trip to Europe for the alleged purpose of arranging for a new shipment of heroin.* According to Perez, Ortega returned to his office several weeks after this trip, along with appellant, and Ortega stated that they had located a new source of supply whom they were going to use in the future (43).

In early August 1969, Ortega and Baeza returned to Perez' office, at which time they purchased airline tickets** for themselves and Baeza's girlfriend, Gladys Toboada, for a trip to San Antonio, Texas, for the alleged purpose of picking up heroin and bringing it back to New York (49-50).***

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*Government Exhibits #19 and #20 are Perez' copies of the airline tickets allegedly issued by him on this occasion (42).

**Government Exhibit #21 consists of the airline tickets allegedly issued by Perez on that occasion (50).

***Perez also stated that Ortega and appellant returned to his office several days later with a suitcase containing $200,000 in small bills, which Perez changed into $100 bills (50).

In September 1969, Ortega and appellant again returned to Perez to purchase airline tickets -- this time for a trip to Switzerland and Spain. Perez testified that he issued the tickets* and also changed $250,000 from small to large denomination bills (52).

In early October 1969, Perez stated, appellant returned to his office alone and reported that the recent trip to Europe had been successful and that he had made contact in France through whom arrangements were made for "another load" (56).

Two weeks later, however, Ortega came alone to Perez' office and stated that the suppliers in France had refused to have any further dealings with Baeza.**

Timely motions for severance were made and renewed throughout the course of the trial, based on Perez' testimony that appellant was expelled from the conspiracy at the end of October 1969 (448-51, 1048-49, 1415, 1628, 2203, 2424, 2455-56).

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*Government Exhibit #22 (53).

**This was the last mention of Baeza in the alleged conspiracy, and based on this testimony the court ruled that as of the end of October 1969 Baeza's participation was terminated (2860).

The French supplier claimed in a letter to Ortega that Baeza had cried in the suppliers' presence, leading them to conclude that appellant was a "weakling" and likely to "talk" if there was any "trouble." The letter further stated, according to Perez' rendition, that the French supplier "will not do no more business with him. He will separate him. He will pay him and he doesn't want to do any more business with him" (57-58).

The only other witness to testify against appellant was Gladys Toboada, a former girlfriend. She stated that she met Baeza soon after her arrival in New York in December 1968. She had contacted appellant through an address at 587 Riverside Drive* which someone had given her immediately before her trip to New York (1244, 1245-48). She stated that during the seven or eight months they had lived together Baeza was actively engaged in the jewelry business and on numerous occasions she had observed him in possession of large quantities of jewels (1244-49).

Over defense counsel's objection of improper foundation,** Toboada testified that on one occasion she accompanied Baeza to a bank in Fort Lee, New Jersey, where he withdrew $3,000, with which he bought her new clothes (1244-48).

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*In the Government's opening statement, the prosecutor offered to prove that Orsini,one of the co-conspirators convicted in the original Jaguar case, had in his possession at the time of his arrest a slip of paper with the address, 587 Riverside Drive, where he would pick up messages regarding the importation of drugs. The Government further asserted that Baeza used this address "for the same purpose" (Transcript of November 13, 1973, at 170).

**Defense counsel stated that without proof of appellant's net worth prior to entering the conspiracy the jury could not fairly infer that the money used to buy clothes was the result of drug dealing (Transcript of November 26, 1973, at 38-42, 53). A motion for a mistrial was made on the same ground at the conclusion of the Government's case (3000).

Toboada testified that in March or April 1969* (1244-46) she flew with Baeza to San Antonio, Texas, for a brief vacation (1244.9-11), at which time she met Luis Ortega and the co-defendant Rodriguez, who visited the house where Baeza and Toboada were staying. She further testified that she observed no drug transactions on this trip (1244).

The twenty-seven other witnesses called on behalf of the Government testified to the substantive offense and subsequent aspects of the alleged conspiracy. More specifically, this included proof concerning the events leading up to the substantive offense charged in count two, i.e., the 200-pound shipment of 97-98%-pure heroin concealed in the chassis of the Jaguar (192-260,** the bribery of court officers in the New York State courts, bail jumping, and bribery of foreign diploments to obtain fictitious passports fraudulently (61, 86, 102-04, 1244.08-109). Other aspects of the conspiracy occurring subsequent to October 1969 included the following: an aborted attempt to smuggle 25 kilograms of heroin into Puerto Rico at a price of $240,000, which resulted in the arrest of an Army general from Santo

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*This flatly conflicted with Perez' testimony and Government Exhibit #21, which reflect that the San Antonio trip was made on August 6, 1969.

**In this regard the Government physically brought into the courtroom and introduced into evidence 93 1/2 kilograms of heroin which had been concealed in the chassis of the Jaguar when it was loaded aboard the Queen Elizabeth II for its voyage to New York.

Domingo* (Transcript of November 21, 1973, at 221), plans to operate a plant** which would convert cocaine paste from a liquid form back to powder form (Transcript of November 18, 1973, at 6; Transcript of November 21, 1973, at 102, 143, 150); and an aborted attempt to smuggle a $500,000-shipment of heroin concealed in the chassis of a racing car which was to be loaded into a Mercedes trailer truck aboard an ocean liner sailing from France (28-30, 34).***

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*As the plane carrying the shipment of heroin was unloaded in Puerto Rico, one of the packages containing heroin accidentally fell and opened (Transcript of November 21, 1973, at 221).

**Several witnesses testified concerning the purchase of a sixty-acre farm in Pennsylvania to be used for the reconversion process. This site was later abandoned when a more convenient location was found at a house in East Hampton, which was allegedly rented for this purpose (7, 13).

***This scheme never succeeded because the racing car was too large to fit inside the trailer (Transcript of November 19, 1973, at 34).

B. The Charge and Verdict

The Judge instructed the jury not to consider acts or transactions occurring after November 1969 in assessing appellant's guilt under count one. He further charged:

> For instance, you cannot consider against Baeza the Jaguar transaction involving the shipment of heroin arriving in New York in September 1971. You cannot consider against Baeza any of the evidence about that transaction, including the heroin that was introduced into evidence regarding that transaction.
>
> (2854).

Four days after the jury returned a partial verdict the Court declared a mistrial as to the co-defendants Terrell and Stanzione, on whom the jurors were unable to agree on a verdict (3076). On the afternoon the jury was discharged, trial counsel for Baeza received a telephone call from Juror #4, who informed him that she had voted for Baeza's conviction because of "pressure" put on her by other members of the jury, "especially the forelady" (Affidavit of Stuart Holtzman, Esq., dated January 24, 1974, at 2). She further stated that immediately after the verdict was delivered against Baeza she wanted to change her vote but believed it was too late. She provided counsel with the names of five other jurors who she believed felt as she did concerning Baeza's conviction. Juror #4 confirmed these representations in an affidavit addressed to the Court, which counsel annexed

to his motion requesting a new trial. In her affidavit, Juror #4 stated:

> It is my opinion that a trial involving so many defendants and so much testimony stretching over so many weeks is unfair to both the defendants and the jurors as it is impossible to remember and evaluate properly the testimony and evidence and put it in its proper perspective when it stretches over such a long period of time. This system is not conducive to allowing a juror to do his job conscientiously and fairly.

Pursuant to this information, counsel contacted Jurors #5, #7, #9, #11, and #12, each of whom asserted that he had wanted to change his vote against Baeza immediately after it had been rendered but did not believe he could do so. The motion for a new trial was denied without a hearing.

ARGUMENT

Point I

THE FAILURE TO SEVER BASED ON THE GOVERNMENT'S PROOF THAT APPELLANT WAS DISCHARGED FROM THE ALLEGED CONSPIRACY ON NOVEMBER 19, 1969, CONSTITUTES REVERSIBLE ERROR.

The Government's case comprised approximately 1,900 pages of a trial record consisting of approximately 3,100 pages. The trial lasted approximately five weeks. The Government called a total of twenty-nine witnesses. This is contrasted to the case against appellant: Only two witnesses, Perez and Toaboada, testified concerning appellant. The latter testimony at best took no more than two hours and occupied only seventy-five pages of the trial transcript. Perez' testimony reflects that appellant was discharged and dismissed from the conspiracy in November 1969 and that the conspiracy thereafter continued through September 1971, the date of the commission of the substantive offense involving the importation of 93 1/2 kilograms of heroin in the Jaguar sports car. The highlight of the Government's case was the introduction into evidence of the 93 1/2 kilograms of 98%-pure heroin concealed in the car.*

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*Since Perez had not testified at this juncture, the evidence was admitted against all the defendants on trial.

Other subsequent aspects of the alleged conspiracy unrelated to appellant involved numerous successful and aborted attempts to smuggle huge quantities of cocaine and heroin into the United States, the bribing of foreign diplomats to obtain fictitious passports, and a clandestine operation directed at smuggling cocaine into the United States in liquid paste form later to be reconverted into the familiar white powder. Each of these events occurred subsequent to appellant's ejection from the alleged conspiracy, and therefore were not relevant to his guilt or innocence of the charge.

Since the substantive offense in count two was predicated on the Pinkerton theory, appellant's discharge from the conspiracy in 1969 resulted in the dismissal of this count. Although the Court instructed the jury to disregard transactions occurring subsequent to November 1969 in assessing appellant's guilt or innocence on count one, this in no way lessened the overwhelming prejudice caused by the cumulative effect of hundreds of hours of testimony relating to bizarre drug dealings in which appellant was in no way involved. The District Judge committed reversible error in denying appellant's timely and persistent requests for severance.

Under United States v. Schaffer, 362 U.S. 511 (1960), "the trial judge has a continuing duty at all stages to grant a severance if prejudice does appear." Id., at 516. This same principle is codified in Rule 14 of the Federal Rules

of Criminal Procedure.*

This Court had occasion to consider the implementation of Rule 14 in United States v. Kelly, 349 F.2d 720, 755-61 (2d Cir. 1970), which involved a long and complex securities fraud. In addition to the principal perpetrators, Kelly and Hagen, the trial also involved the defendant Schuck, who, like the appellant here, was involved in only one small aspect of the extensive overall scheme established by the Government's proof. The Court held that the failure to grant Schuck's motion for severance constituted reversible error. The prejudice to Schuck consisted in the "accumulation of wrongdoing by his co-defendants." Id., at 756.

> ... The principal and inevitable prejudice ... was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Schuck's co-defendants Kelly and Hagen.... That some of this rubbed off on Schuck we cannot doubt.
>
> Id., at 759.

In contrast to the rather dry and unemotional nature of the stock fraud prosecution in Kelly, here the bizarre and emotionally-charged events occurring subsequent to appellant's disengagement from the conspiracy and culmi-

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*Rule 14 provides: "If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

nating in the introduction of approximately two hundred pounds of pure heroin concealed in the Jaguar rendered it virtually impossible for the jury to determine appellant's guilt or innocence.

More recently, in United States v. Falley, 489 F.2d 33 (2d Cir. 1974), this Court had occasion to consider the prejudicial effect of the Government's improper introduction of a suitcase containing five kilograms of hashish and a "small quantity" of heroin. The suitcase and its contents were unrelated to the conspiracy for which the Falley defendants were tried.

Further, in Falley the Government introduced five kilograms of hashish, whereas here the proof unrelated to appellant's involvement consisted of 93 1/2 kilograms of the more dangerous and emotionally-charged drug heroin. Moreover, in Falley, because of the offensive odor caused by the drugs, the Court directed that they immediately be removed from the courtroom. Here, the heroin was before the jury for a substantial period. The court was compelled to reverse.

In United States v. Donaway, 447 F.2d 940 (9th Cir. 1971), the court reversed for failure to grant defendant's timely motion for severance. There the testimony relating to Donaway comprised approximately fifty pages of a trial record of 2,300 pages on the Government's case. Since Donaway was in no way connected with the "doping" of horses,

which made up the balance of the Government's case, a new trial was required. The extent and nature of the unrelated evidence here also requires reversal.

It is anticipated that the Government will argue that appellant was not prejudiced because the results show that the jury exercised discrimination in its verdict in that it disagreed as to two defendants and convicted only appellant. This argument was rejected by the Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946), on the grounds that an accused has the right

> ... not to be tried en masse for the conglomeration of distinct and separate offenses committed by others....
>
> Id., at 755.

This reasoning applies with even greater force in the present case for here, unlike Kotteakos, several of the jurors communicated with defense counsel and with the court, and by affidavit informed the trial judge of the confusion and difficulties experienced in properly evaluating the testimony as to each defendant.

The Government contended in Falley, supra, as it will undoubtedly do here, that the defendants were not prejudiced since the court gave cautionary and limiting instructions to the jury. In reversing in Falley, this Court stated:

> Under the circumstances, the court could not, with a mere verbal instruction, undo the sensation created by the introduction of

> this large quantity of drugs into the courtroom. The prejudice, unfairly enlisted, would have undoubtedly continued to color the proceedings to the defendant's prejudice.
>
> Id., at 38.

The unrelated and prejudicial evidence which caused the reversal in Falley wanes to virtual insignificance when contrasted to the weeks of unrelated evidence nere, culminating in the introduction of 93 1/2 kilograms of heroin. Moreover, unlike Falley, the Court need not speculate as to the extent of prejudice, for here there is concrete proof from members of the jury that they were unable to follow the limiting instructions of the court. The case must be reversed.

Point II

WITHOUT REQUIRING ANY FOUNDATION OR CONNECTION, THE DISTRICT COURT PERMITTED THE GOVERNMENT TO SHOW THAT APPELLANT SPENT $3,000 ON NEW CLOTHING FOR GLADYS TOBCADA, THEREBY PERMITTING THE JURY TO CONCLUDE THAT THIS MONEY RESULTED FROM APPELLANT'S PARTICIPATION IN THE ALLEGED DRUG CONSPIRACY.

Over strenuous defense objection* of improper foundation, the Government was permitted to elicit testimony from its witness, Gladys Toboada, that appellant spent approximately $3,000 on clothes for her after her arrival in New York. Without offering any prior foundation for this testimony, and without showing any connection between the $3,000 withdrawn from the bank and the alleged conspiracy to import drugs, the jury nevertheless was free to infer that this was profit from appellant's participation in the alleged scheme. The improper admission of this testimony constitutes reversible error.

The Government's use of Gladys Taboada's testimony concerning the $3,000 is analogous to the "net worth" theory employed by the Government in the prosecution of tax fraud cases. In Holland v. United States, 348 U.S. 121 (1954), the Court held that an essential element of a prosecution

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*At the conclusion of the Government's case, defense counsel moved for a mistrial based on the improper introduction of this damaging testimony.

of this type is "the establishment, with reasonable certainty, of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's assets." Id., at 131. Once this is established, the Government may show that an accused's sources of income could not support his standard of living. The Court noted, however, the "problems" which this theory raised in a criminal prosecution, one of the gravest being that "such a rule would tend to shift the burden of proof." Id., at 128. For this reason, the Court cautioned the "exercise of great care and restraint." Id., at 129.

As this Court recently noted, in United States v. Falley, 489 F.2d 33 (2d Cir. 1973), there are two distinct views concerning the admissibility of evidence of possession of large sums of cash. Under the first view, prior to the admission of such testimony the Government must show the "impecuniosity" of the defendant. United States v. Haas, 344 F.2d 56 (8th Cir. 1965).

The second view, and the one espoused by this Court in United States v. Falley, supra, is that the absence of proof of prior impecunity goes to the weight, rather than to the admissibility, of such evidence. United States v. Goldstein, 456 F.2d 1006 (8th Cir. 1972); United States v. Mirenda, 443 F.2d 1351 (9th Cir.), cert. denied sub nom. Verdugo-Medina v. United States, 404 U.S. 966 (1971); United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied,

402 U.S. 947 (1971); United States v. Brewer, 427 F.2d 409 (10th Cir. 1970).

However, regardless of which view one takes, under each view it is essential that the Government show a connection between the possession of the money and the facts of the alleged offense.

The classic case in this area is Williams v. United States, 168 U.S. 382 (1897). There, the defendant was a federal revenue agent assigned as a Customs collector at the Port of San Francisco. He was charged with extorting sums of money from Chinese immigrants who sought entry into the United States. To support this charge, the Government proved that the defendant's salary during the period in question was $4 to $5 per day. The Government also introduced into evidence the defendant's bank book, which reflected a balance of $4,750 as a result of separate deposits made during the same period.

The Court held that the defendant's failure to explain the source of the money deposited in his bank account did not support the conclusion that he had extorted it as alleged in the indictment. Such an interpretation would infringe on the accused's presumption of innocence in a criminal case. Since there was no connection between the alleged extortion and the deposits in the defendant's bank account, no unfavorable inference could be drawn even though the Government had shown that the accused's monthly income as a

revenue agent did not exceed $150 per month.

Subsequent cases have taken a clue from Williams and required that a proper foundation be laid prior to the introduction of such evidence. In United States v. Brewer, supra, relied upon by this Court in Falley, supra, the Government showed that the defendant purchased a car for $2,500, using bills in the identical denomination as those missing from the bank. Similarly, in United States v. Crisp, supra, the Government not only showed that prior to the robbery the defendants were out of work and in need of money, but also that after the robbery they divided the loot and went to Chicago where they purchased new clothes and picked up some girls who flew to Las Vegas with them for some gambling. The court found this foundation adequate to permit one of the girls to testify to cash expenditures for the plane tickets and gambling and as to her observation of large sums of money in a suitcase belonging to the defendant's partner.

In United States v. Falley, supra, the Government did not simply introduce evidence of cash expenditures, as it did here; rather, there the Government laid a foundation by introducing the defendant's 1970 and 1971 income tax returns, which reflected salaries of $7,000 and $3,000 for those two years. In addition, the Government introduced evidence through a travel agent that during this same two-year period the defendant had spent some $20,000 on airline

tickets. Moreover, the latter amount was not listed as a business deduction on the tax returns.

Contrary to Falley, Crisp, and Brewer, there was no connection shown here between the $3,000 and the alleged conspiracy, yet the jury was permitted to make such an inference. Since appellant's defense was the impeachment of the Government's chief witness, George Perez, an admitted co-conspirator with much to gain by testifying for the Government, any evidence which tended to corroborate Perez undoubtedly took on special significance in the jury's eyes. Gladys Goboada's testimony concerning the $3,000 provided the necessary corroboration the Government so desparately needed. Thus, the improper introduction of this testimony severely prejudiced appellant's trial.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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June 11, 1974

Certificate of Service

March 9, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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